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FEDERAL TRADE COMMISSION
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MAR 3 1 2000
SECRETARY

March 31, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: 16 CFR §313 - Privacy of Consumer Financial Information; Proposed Rulemaking for the Gramm-Leach-Bliley Act

To Whom It May Concern:

I am writing on behalf of the Real Estate Information Providers Association (REIPA) to express our concerns with the Commission's proposed regulations to implement Title V of the Gramm-Leach-Bliley Act of 1999. While the purposes of the Act and the implementing regulations are laudable, REIPA respectfully submits that the regulations as currently proposed are ambiguous and over-broad. Unless the regulations are narrowed in scope and clarified in meaning, they will severely injure the public records industry, as well as strain the American economy as a whole. Moreover, the breadth of the regulations do not seem in accord with the Gramm-Leach-Bliley Act. The Act regulates the manner in which personally identifiable financial information may be disclosed publicly by a financial institution. The Regulations are intended to clarify what information is covered under the act, how it is to be protected, and explain the means by which such information may be disclosed. The Regulations must explicitly exempt public real estate data, which is essential to mortgage lenders in assessing lending risks and low cost mortgages and loans.

REIPA

REIPA was established as a forum for providers of real estate information and for providers of information technology related to real estate. The primary function of our members is to provide real estate information to lending institutions when evaluating mortgages. The work we do helps such lending institutions to marginalize the risks associated with lending and provide lower cost mortgages to home buyers. For the lender, risk is marginalized when a lending institution can accurately assess the risk a borrower may bear. In addition, many of our members provide store houses of data products that consist of refined data collected from public records of home buyers, mortgage holders, selling prices, plat listings, and the like. From this public data, marketers, investors, and governments are able to

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create information that enables them to more efficiently serve individuals and communities. Other consumers of REIPA member products include newspapers and other news agencies, which rely on the information to insure accuracy in reporting and to more readily promulgate newsworthy information.

The function of REIPA members cannot be overstated. REIPA members provide, by electronic means, public records data that is available to the public, but is difficult to access (i.e., it is publicly available to all, but located physically at a courthouse or other government records facility).

1) **Public Real Property Records.** Real estate transaction records have been public in virtually all American jurisdictions, from the inception of this country for a variety, of obvious reasons. The sale of real property is recorded in a public forum to permit clear lines of title to be established. Without a system of public records, there would be no mechanism for collecting or recording judgments, executing liens, executing mortgages or buying or selling land safely. Throughout the country, mortgage lien information is publicly available. Public records for real estate purchases/sales are critical for title searches and many other functions. There is a great need for this data to be available to financial institutions, which need to have a system of recording real estate records to facilitate real estate transactions. Real property records must be available for inspection by all members of the public so that anyone can determine the status of real property, what easements or liens may encumber the property, whether there is a clear chain of title, etc.

2) **Public Records of Taxation.** Similarly, many jurisdictions opt to make real property tax assessments public. This can further the public trust by creating transparency of property records. Reporters may use this data to track the identity of an owner of real property (e.g., if a reporter were writing a story about an environmental spill or some similar issue). The Regulations should not make data that the government makes publicly available by law, regulation, or policy "private" through the operation of the Act. The implementing regulations should make this clear.

3) **MLS Databases.** Similarly, databases that are designed with wide public dissemination in mind should be expressly excluded. For example, MLS (multiple listing services) databases are databases of real property listings (i.e., homes for sale) that are created on behalf of consumers who wish to sell their homes. The only reason for the listing is the fact that a consumer wants to sell his/her home. The consumer will only be listed in the MLS database if he/she is working with a realtor to broadly disseminate information about the sale of his/her home. Such MLS databases should not fall within the scope of the Act, as these Regulations and the Commission's guidance should make clear.

4) **Records of Public Sanctions, Government Enforcement Actions.** Virtually all government agencies make public (unless the matter is under seal, or handled privately) their sanctions of convicted criminals, licensed professionals such as members of the brokerage profession, sanctions of licensed CPAs/accountants, and attorneys. There is a significant public benefit when the FTC, SEC, NASD, a state licensing board or other body with the power to sanction explicitly chooses to make public a reprimand or harsher sanction. Indeed, when such an agency chooses to sanction publicly, it is serving notice on the public that this action is being taken. Certain firms republish this data electronically. Such databases disseminating information intentionally made public

by the government should be able to do so free from the reach of the statute. The Commission's Regulations should make this quite clear. The Regulations should make clear that information disseminated by the government to the public is exempt from the definition of "nonpublic personal information."

Ironically, an illustrative example is the Commission's own public sanctions of natural persons guilty of fraud or who enter into consent decrees with the Commission are not expressly listed as outside the reach of the Act. We urge the Commission to broaden the examples of information that is public under the Act (See Section 313.3(p)(2)). If criminals and fraudfeasors could "opt-out" of the dissemination of their own public sanctioning by government enforcement officials, the result would truly be perverse. Such a result would frustrate sound law enforcement and render ineffective the acts of Government agencies such as the FTC's Bureau of Consumer Protection who publicize their consent decrees to alert the public to the conduct subject to sanction.

5) Information Released Pursuant to FOIA Requests. Government agencies also supply data in response to FOIA requests (e.g., FTC Watch). Once a government agency scrubs and releases this data via a FOIA or state FOIA regime, this should be explicitly exempt from the reach of the Act. Reporters and others given access to these government files should be able to freely disseminate this data.

6) Corporation Records. Data on the identity of the incorporators of a business or major shareholders should be public, if the state chooses to make this data public. This data is believed to be public in all 50 states. Where this data is public, this Act via the Commission's implementing Regulations should not call into question the public nature of this data.

7) Public Lien Records. All data concerning liens or mortgages that are made publicly available should be exempt from the reach of the Act. UCC-1s, mortgages, liens, garnishments, mechanics liens and the like, make possible our system of real property financing. Any impediment to the flow of this data will have grave implications for the members of REIPA and render the customers of REIPA members far less able to lend money or complete real property transactions. This would be an unintended consequence of the Act.

8) Public Hearings and Court Proceedings. All unsealed court records, pleadings, hearing records and the like that are available publicly (i.e., not maintained under seal) should be exempt from the reach of the Act.

9) Public Data is Always Public Data. The regulations and the Commission's guidance must make clear that merely because financial institutions use the above categories of public data, their use does not convert this data to nonpublic information. The regulations should make clear that public data is always public data. All of the above illustrations of public data are necessarily used by financial institutions as well as the public at large. As the regulations currently stand, the use by a financial institution of this data may convert it to nonpublic information.

10. First Amendment Limits. We respectfully suggest that there are First Amendment and related public policy concerns with any interpretation of the Act that curtails public access to

information that is today publicly available. Investigative reporters rely on the foregoing categories of public records data to investigate charges of corruption involving public officials. For example, if public funds were being used to build a dam or highway, the identity of the landholders who might benefit from the project could be directly relevant. Many members of REIPA count newspapers among their largest subscribers for the electronic, searchable versions of the public records listed above.

Making Real Property Records Accessible Electronically

The real estate information industry significantly reduces time and transaction costs by providing information in electronic form or media to lending institutions and other mortgage institutions, enabling the home-buying borrower and the lending-institution to quickly arrange cost-effective financing. REIPA members are a vital link that enables lending institutions to accurately establish lending risks, and most accurately determine the cost of a particular loan. REIPA members take the public records information on real estate transactions and disseminate this data electronically for rapid access and for value-added information services.

Moreover, the data honed by REIPA members also enables governments to better assess what services that are required for a given community. By monitoring community real estate by means of the services provided by REIPA members, governments are able to provide better education, better trash and street maintenance, and better police and fire protection. Also, such information provides city, state and the Federal governments with a means to assess environmental impacts that certain geographic areas and communities may be facing. By extension, utility firms may use such data to market and more efficiently provide their services to consumers.

There are several public policy concerns not addressed adequately by the current draft regulations. The importance of useful information and statistics has increased with the advent of the computer and the sciences of econometrics and data mining. With advanced statistical modeling, we are now able to better predict human and market behavior, and better able to allocate scarce resources to best serve social needs. With more accurate information, governments, industry, and financial institutions can better provide cost effective services and products to customers. The Regulations as they now stand will seriously alter the manner in which such useful information may be collected and used. Further, real property public record data is used to combat fraud. Without an easy, low cost method to ascertain the title holders of property, more consumers will become victims of such fraud. Indeed, the costs of the proposed Regulations have a significant effect on society because government will be less effective, industry more costly, and financial institutions will take on greater costs to minimize risks of loss.

Specific Concerns

Respectfully, the Proposed Regulations deviate from plain meaning of the statute. The regulations unintentionally sweep otherwise public data into a protected sphere. The Act provides that the information to be protected be "personally identifiable financial information." However, the effect of the regulations as drafted takes this phrase and expands its meaning to include everything even remotely related to financial information, including information that is already on the public

record (e.g., property records). Moreover, information that is otherwise public, but travels with data that is "financial" in nature immediately becomes private under the regulations. Again, this seems to ignore the plain meaning of the statute and impose a broader standard than that which was legislated.

Section 313.1(b) of the Regulation limits the scope of the Regulation to financial institutions as defined in Section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1834(k). In Section 4(k), Congress specifically limited the scope of financial institutions, and the comments regarding Section 313(j) expressly accepts that definition. However, in the comments concerning Section 313.1(b) of the Regulation, the Commission seems to signal that it will exercise its authority against "other persons," but is vague as to who those "other persons" may be. In Sections 313.3(j)(2) and 313.3(j)(3)(iv), the Commission explains that it views a "financial institution" as an institution "the business of which is engaging in financial activities," and goes on to explain that this standard applies, "only if it is significantly engaged in a financial activity."

The Commission needs to be explicit. Otherwise, the regulations will make public real property records private. The current Regulation is vague because the Commission has said there are "other persons" besides financial institutions for whom the act applies, and those other persons must be "significantly involved" in financial activity. These definitions must be narrowly construed to be effective, and must be explicitly defined. Common sense dictates that real property data organizations such as REIPA's members would not be considered financial institutions, but the regulations make such a conclusion less certain.

In Section 313.3(c), the proposed term "collect" is also vague. Reading part (c) alone, the Regulation seems to indicate that any data concerning an individual, regardless of how it is gathered, is protected if it is organized in a manner that is personally identifiable. However, reading through the entire Regulation, it seems clear that obligations arise only when a financial institution garners data and information when engaging in a financial transaction with a consumer. Again, the Commission should be explicit that only data and information that is "financial" in nature is indeed protected, and that information gathered from public sources is not covered by the Regulation. The FTC should make it clear in its Regulations that real property data from public records is exempt from the reach of these regulations.

The definition of "financial product or service" in Section 313.3(j) should also be clarified. While it is clear non-financial information is not included in the Regulation, the understanding of what is "financial" data is unclear. The Regulations seem to suggest that if a financial institution draws a correlation between two variables, one of which is financial in nature and one of which is drawn from public sources, and generates a report the conclusion of which is non-financial and not personally identifiable, the resulting information could not be disclosed because a portion of the information was tainted as personally identifiable financial information.

REIPA suggests the Commission provide greater clarity in this definition. Consistent with the Regulations, Section 313.3(k) should be limited to only financial information that is generated which specifically identifies the customer. Data which may stem from individuals but is organized on an anonymous or aggregate basis should not be swept into this definition. Thus, the specific data that is private would be protected, while the useful information that neither exposes the identity of the

individual nor divulges personal financial data could be disseminated. In addition to clarifying that any information from the public domain is not covered in the Regulation, the Commission should clarify Section 313.3(k) by drawing a line, so that once information is "no longer personally identifiable" it is not covered by the Regulation or the Act.

Regarding Sections 313.3(n, o, and p), regarding the definition of "nonpublic personal information", the proposed Regulations are over-broad and do not provide meaningful guidance to vendors of public records. Both proposed models (A & B) provide that information that is otherwise public is not covered by the Regulation. But information that is affiliated with "financial information," regardless of whether it is public or not, is covered by the Regulation. Public information should remain public regardless of how it has been processed by an individual. In addition, REIPA suggests that more precise definitions be provided for the Sections 313.3(n, o, and p) terms "nonpublic personal information," "personally identifiable information," and "publicly available information" to clearly explain that any information that is otherwise public is not within the scope of the Regulations, regardless of its nature. We have a preference for Alternative B, but both Alternatives need additional clarifying language.

Section 313.3(p)(1) should include information "that is lawfully made available to the general public (regardless of media)" to make clear that the release of information in written form (e.g., in a public recording deed record book) makes the information contained in the record book public even if it is not put into electronic form by the government.

Section 313.3(p)(2) should have additional categories of examples. We believe that the 10-item list above is a starting point for inclusion in this list.

Lastly, Sections 313.4(d) dealing with initial notice to customers, and 313.12, dealing with limits on re-disclosure of information, are of particular concern to REIPA's members. Section 313.4(d) does not make clear that when personally identifiable financial information has been disclosed to a third party whether that third party is required to provide subsequent notice of redisclosure to the customer. Likewise, it is not clear who the customer in such a scenario would be. Section 313.12 is similarly unclear.

The onus of notice under the FTC's regulation should be on the primary financial institution which must clearly notify third parties of their obligation to maintain the privacy of certain information. Third parties should not be obligated to provide the notice that should rightly fall on the primary financial institution. The cost and difficulty of a "non-affiliated" third party to provide consumer re-disclosure is wholly impractical. Nonetheless, this result is a conceivable interpretation of the current draft regulation. REIPA respectfully requests that the Commission make clear the responsibilities of primary financial institutions, and insure the onus of maintaining privacy remains with primary financial institutions. Otherwise, the Commission's Regulations will impose enormous burdens on unaffiliated third parties.

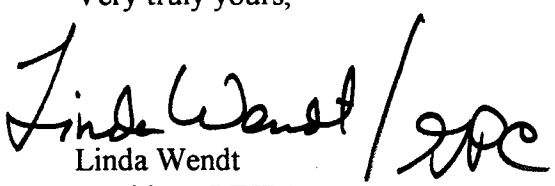
A Proposed Solution

As a proposed solution, REIPA suggests that the Commission adopt Regulations more limited in scope. For example, the Regulations should protect (as per the statute) only information that is "personally identifiable financial information." Thus, financial information that is not personally identifiable (i.e., data that is (A) rendered anonymous prior to dissemination or (B) aggregated) should be expressly exempted from the Regulation.

Real property transaction data and the other categories of public data listed above should be expressly exempted from the Regulation. The real property data on the purchase and sale of land, the names of the buyer and seller, the amount paid, and other public data is not within the 9 (A-I) specified statutory categories of "activities that are financial in nature." The Act may well apply to certain personal borrower information, but the real property transaction records themselves are public by statute in virtually every state. Thus, for the sake of clarity, the Commission should expressly exclude public records of real property transactions from the Act. This data is public in every sense of the word as the data is available for public inspection on a daily basis. Sweeping this data along with the highly personal borrowing data or securities data of individuals will impose enormous costs of compliance for the real property records industry. This would be truly a bizarre outcome given the already public nature of the data. Without express language, ambiguity will needlessly deny access for real property data firms to public information, and thus their livelihood.

Ultimately, consumers will bear the unnecessary costs associated with these Regulations. REIPA's members have been working with financial institutions to reduce the costs of home ownership by eliminating needless record retrieval costs through automation. The great strides that have been made in reducing loan origination costs and fraud have come through the wide dissemination via electronic means of public real property data. We strongly encourage the Commission to hone the Regulations as outlined here, and narrowly and accurately construe the statute so as to prevent the wholesale destruction of an important sector of our market economy. We stand ready to assist the Commission in drafting language to improve the Regulations and eliminate this regrettable ambiguity.

Very truly yours,



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